

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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LATONIA SMITH,

Plaintiff,

v.

FENNEMORE CRAIG,

Defendant.

Case No. 2:19-cv-00824-GMN-EJY

**REPORT AND RECOMMENDATION**

ECF No. 91 (Motion to for Leave to File  
Amended Complaint)

Pending before the Court is Plaintiff Latona Smith's Motion for Leave to File Amended Complaint (ECF No. 91). The Court has considered Plaintiff's Motion, Defendant's Response (ECF No. 92), and Plaintiff's Reply (ECF No. 93).

**I. Background**

This case commenced on May 13, 2019 when Plaintiff filed her original complaint. ECF No. 1. After a substantial number of filings and motion practice regarding remand, discovery, and dismissal of claims, the Court issued an Order on March 4, 2020 regarding Defendant's Motions to Dismiss (ECF Nos. 10 and 11) and Plaintiff's Cross Motion to Amend (ECF No. 22). ECF No. 83. That Order granted Plaintiff twenty-one days from March 4, 2020 to file an amended complaint regarding claims dismissed without prejudice. *Id.* Plaintiff did not do so. Instead, Plaintiff filed a Motion to Stay Case, which the Court denied on December 14, 2020. ECF No. 89. In the same Order, the Court granted Plaintiff an additional twenty-one day period within which to file an amended complaint. *Id.* Plaintiff's amended complaint was therefore due no later than January 4, 2021.

It is undisputed that Plaintiff did not file her Motion to Amend until March 8, 2021. ECF No. 91. It is further undisputed that an amended complaint was not attached to Plaintiff's Motion. *Id.* Nonetheless, the Court liberally construes pages 8 through 13 of Plaintiff's Motion for Leave to

1 File an Amended Complaint as the proposed amended complaint. In that proposed amended  
 2 complaint Plaintiff seeks to assert claims for civil conspiracy, defamation/defamations per se, breach  
 3 of contract, and intentional infliction of emotional distress.

## 4 **II. Discussion**

### 5 A. The Timeliness of Plaintiff's Motion to Amend.

6 On two occasions, the Court granted Plaintiff the opportunity to amend her Complaint in an  
 7 effort to prevent dismissal of all claims. ECF Nos. 83 and 89. Plaintiff's instant Motion comes 61  
 8 days after the Court granted her a second opportunity to file an amended complaint. *Compare* ECF  
 9 Nos. 89 and 91. Plaintiff explains that her Motion is untimely because she was transferred from one  
 10 facility to another and did not receive the Court's December 14, 2020 Order until February 2021.  
 11 ECF No. 91 at 1. The exact day in February Plaintiff received the Court's December 14, 2020 Order  
 12 is not clear; however, it appears to be the same day she hand wrote her Motion and proposed amended  
 13 complaint—February 1, 2021. *Id.* Giving Plaintiff the benefit of the doubt regarding when she  
 14 received the Court's Order and the promptness with which she responded, the Court declines to  
 15 recommend denial of Plaintiff's Motion based on timeliness.

### 16 B. Plaintiff's Violation of LR 15-1(a).

17 Defendant takes issue with Plaintiff's failure to attach a copy of the proposed amended  
 18 complaint to Plaintiff's Motion. ECF No. 92 at 5. While Defendant is technically correct that  
 19 Plaintiff does not attach a copy of her amended pleading to her Motion, she does include her amended  
 20 pleading within her Motion on pages 8 through 13. Thus, the Court chooses not to apply an overly  
 21 technical reading of LR 15-1(a) to this pro se Plaintiff's filing and declines to recommend denial of  
 22 Plaintiff's Motion based on the failure to comply with LR 15-1.

### 23 C. Plaintiff Fails to State Claims Upon Which Relief May Be Granted.

24 Plaintiff's Motion for Leave to File Amended Complaint is reviewed by the Court under Fed.  
 25 R. Civ. P. 15. Rule 15(a)(1) allows a party to "amend its pleading once as a matter of course . . . 21  
 26 days after serving it." If Rule 15(a)(1) does not apply, the party seeking to amend must obtain the  
 27 opposing party's written consent or the Court's leave to file the amended pleading. Fed. R. Civ. P.  
 28 15(a)(2). A motion for leave to amend brought pursuant to Rule 15(a)(2) should be granted freely

1 “when justice so requires.” When a party seeks court permission to file an amended pleading, the  
 2 decision whether to grant leave “lies within the sound discretion of” the court. *DCD Programs, Ltd.*  
 3 *v. Leighton*, 833 F.2d 183, 185–86 (9th Cir. 1987) (internal citation omitted). The amendment  
 4 standard is “applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d  
 5 1048, 1051 (9th Cir. 2003) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712  
 6 (9th Cir. 2001)).

7 There are five factors courts consider when deciding whether to grant leave to file an  
 8 amended complaint. These include “bad faith, undue delay, prejudice to the opposing party, futility  
 9 of amendment, and whether the plaintiff has previously amended the complaint.” *Interior Electric*  
 10 *Incorporated Nevada v. T.W.C. Construction, Inc.*, Case No. 2:18-cv-01118-JAD-VCF, 2019 WL  
 11 1767884, at \*2 (D. Nev. Apr. 22, 2019) (internal citation omitted). The party opposing the  
 12 amendment bears the burden of showing why leave should be denied. *Desert Protective Council v.*  
 13 *U.S. Dept. of the Interior*, 927 F. Supp. 2d 949, 962 (S.D. Cal. 2013) (citing *Genentech, Inc. v. Abbott*  
 14 *Labs.*, 127 F.R.D. 529, 530-31 (N.D. Cal. 1989)). Because Plaintiff has had multiple opportunities  
 15 to state the claims she seeks to assert through her current amendment, the facts upon which Plaintiff  
 16 bases those claims have not changed (*compare* ECF Nos. 1, 22 and 91), and granting continued  
 17 opportunities to allow Plaintiff to amend would unduly prejudice Defendant, the Court recommends  
 18 denying Plaintiff’s Motion for Leave to File Amended Complaint and dismissing this action.

#### 19 1. *The Iqbal/Twombly Standard.*

20 A complaint must include “[a] short and plain statement of claims showing the pleader is  
 21 entitled to relief. Fed. R. Civ. P. 8(a)(2); *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 555  
 22 (2007). Well pleaded allegations of material fact asserted in a complaint will be treated as true,  
 23 while legal conclusions are not entitled to the same presumption. *Ashcroft v. Iqbal*, 556 U.S. 662,  
 24 679 (2009). A plaintiff must do more than assert “[t]hreadbare recitals of the elements of a cause of  
 25 action.” *Id.* at 678 (internal citation omitted). Instead “a complaint must contain sufficient factual  
 26 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (internal citation  
 27 and quote marks omitted). A facial plausible claim exists “when the plaintiff pleads factual content  
 28 that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

1 alleged.” *Id.* (internal citation omitted). In sum, the U.S. Supreme Court’s decision in “*Iqbal* states  
 2 that to satisfy Rule 8’s requirements, a complaint’s allegations must cross “the line from conceivable  
 3 to plausible.” *Hester v. Stout Management*, Case No. 2:20-cv-02115-APG-VCF, 2020 WL 7427522,  
 4 at \*1 (D. Nev. Dec. 18, 2020) citing *Iqbal*, 556 U.S. at 680 citing *Twombly*, 550 U.S. at 547.

## 5 2. Plaintiff’s Civil Conspiracy.

6 As explained in the Court’s March 4, 2020 Order, “[a]n actionable civil conspiracy consists  
 7 of a combination of two or more persons who, by some concerted action, intend to accomplish  
 8 an unlawful objective for the purpose of harming another, and damage results from the act or  
 9 acts.” ECF No. 83 at 14 citing *Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*,  
 10 971 P.2d 1251, 1256 (Nev. 1998) (internal citations and quotation marks omitted). In her  
 11 proposed amended complaint, Plaintiff reasserts her civil conspiracy claim incorporating the  
 12 facts asserted in her “first complaint cause of action #2,” and further alleges that Defendant  
 13 conspired with “CEC/PHWLTV” (Caesars Entertainment Corporation and Planet Hollywood Las  
 14 Vegas) to defame Plaintiff by calling her a schizophrenic and breaching a confidential settlement  
 15 agreement. ECF No. 91 at 8.

16 However, on March 4, 2020, the Court dismissed Plaintiff’s civil conspiracy claim  
 17 against Fennemore Craig with prejudice. ECF No. 83 at 23. As such, res judicata bars  
 18 reassertion of this claim.

19 There can be little doubt that a dismissal with prejudice bars any  
 20 further action between the parties on the issues subtended by the  
 21 case. *See Colonial Auto Center v. Tomlin (In re Tomlin)*, 105 F.3d  
 22 933, 936–37 (4th Cir. 1997); *Daewoo Electronics Corp. of America,*  
 23 *Inc. v. Western Auto Supply Co.*, 975 F.2d 474, 478 (8th Cir. 1992).  
 24 As we said in *Concha v. London*, 62 F.3d 1493, 1508 (9th Cir. 1995),  
 25 “[t]he plaintiff is precluded from bringing another action for the  
 26 same cause” when “the dismissal of his action with prejudice  
 stands.” *Id.* at 1508; *see also Himalayan Ind. v. Gibson Mfg. Co.*,  
 434 F.2d 403, 405 (9th Cir. 1970). Those dismissals have res  
 judicata effect because, it is said, they are on the merits, and  
 “[u]nder res judicata, a final judgment on the merits bars further  
 claims by parties or their privies based on the same cause of action.”  
*Marin v. HEW, Health Care Financing Agency*, 769 F.2d 590, 593  
 (9th Cir. 1985).

27 *In re Marino*, 181 F.3d 1142, 1144 (9th Cir. 1999).

1 Accordingly, under the principles of res judicata, Plaintiff cannot revive her civil  
 2 conspiracy claim in her proposed amended complaint and the Court recommends dismissal of  
 3 Plaintiff's civil conspiracy claim with prejudice.

4 3. *Plaintiff's Defamation Claims.*

5 Plaintiff's proposed amended complaint alleges that Defendant Fennemore Craig spread  
 6 "defamatory accusation" to employees of CEC/PHWLTV, employees of the Culinary Union, and  
 7 employees of her mother, Ms. Peruzar. ECF No. 91 at 3-4. Plaintiff further alleges that in April  
 8 2018, an employee of Defendant called Plaintiff the "n-word" and threatened Plaintiff with  
 9 bodily harm while at the Las Vegas Justice Center. *Id.* at 5. Plaintiff contends that an employee  
 10 of CEC, Ethan Thomas "parroted" Defendant's employee.<sup>1</sup> Defendant also allegedly spread lies  
 11 about Plaintiff when Defendant identified Plaintiff as schizophrenic, after which Mr. Thomas  
 12 and Defendant's employee accused Plaintiff of threatening them. *Id.* at 6-7. Plaintiff says that  
 13 schizophrenia is a "differential diagnosis" and then incorporates elements of this claim found in  
 14 her original Complaint. *Id.* at 9.

15 Even if the Court assumes Defendant made some statement to unidentified third parties  
 16 about Plaintiff's mental health diagnosis, these statements may not constitute defamation if they  
 17 are true. *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 88 (Nev. 2002). Indeed, Plaintiff seems  
 18 to admit that Defendant's statement regarding her diagnosis is true when she discusses the  
 19 meaning of a differential diagnosis for schizophrenia. ECF No. 91 at 9. Thus, if Defendant  
 20 made a statement regarding Plaintiff's mental health diagnosis to some third party, and that  
 21 statement is true, Plaintiff's defamation claim fails as a matter of law. However, because the Court  
 22 cannot glean from Plaintiff's filing whether she, in fact, admits the truth of the alleged defamatory  
 23 statement regarding her mental health diagnosis, and her alleged defamation claims are based on  
 24 more than just Defendant's alleged statement regarding Plaintiff's schizophrenia, the Court analyzes  
 25 whether Plaintiff states a defamation/defamation per se claim.

26 The Court considers Plaintiff's allegation that Defendant made some statement to "third  
 27 parties separate to [sic] court proceedings" regarding Plaintiff issuing threats and harassing

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28 <sup>1</sup> Neither CEC nor Ethan Thomas are named in Plaintiff's purported Amended Complaint.

1 messages. ECF No. 91 at 9. The Court notes that on April 22, 2019, Defendant filed a Motion in  
 2 the Clark County Eighth Judicial District Court alleging Plaintiff engaged in “criminal and civil  
 3 assault” under Nevada law. ECF No. 83 at 16 *citing* Defs.’ Em. Mot. Protective Order, Ex. B to  
 4 Def.’s Mot. Judicial Not., ECF No. 12-2. This is the only occasion on which the Court could  
 5 find any record of Defendant asserting such an allegation. *Id.* Thereafter, in March 2020, the  
 6 Court explained to Plaintiff that her allegation lacked sufficient detail, which meant Defendant  
 7 did “not have adequate notice of the grounds upon which Plaintiff’s claims rest.” *Id.* at 17 *citing*  
 8 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Schaefer v. Diamond Resorts Int’l Mktg.,*  
 9 *Inc.*, Case No. 2:14-cv-01900-GMN, 2015 WL 1932196, at \*8 (D. Nev. Apr. 28, 2015)  
 10 (dismissing defamation and slander claims because the complaint lacked allegations indicating  
 11 “to whom these false statements were made and when they were made”). Despite explaining to  
 12 Plaintiff that she lacked sufficient detail to state a defamation claim, Plaintiff’s proposed  
 13 amended defamation and defamation per se claims suffer from the same lack of detail. Plaintiff’s  
 14 present defamation allegations, even if the Court incorporates her original complaint defamation  
 15 allegations, fail to include when or to whom the alleged false claims were made. *See* ECF No.  
 16 91.

17 Plaintiff has had ample time to amend her complaint with ample notice and explanation  
 18 of what she needed to do to correct the shortcomings found in her original defamation claims.  
 19 Granting Plaintiff leave to file yet another amended complaint to cure these same deficiencies  
 20 would unreasonably and prejudicially delay this two year old matter, which has never gotten  
 21 past the pleading stage. Thus, the Court recommends Plaintiff’s defamation/defamation per se  
 22 be dismissed with prejudice.<sup>2</sup>

#### 23 4. Plaintiff’s Breach of Contract Claim.

24 A breach of contract claim under Nevada law requires “(1) the existence of a valid contract,  
 25 (2) a breach by the defendant, and (3) damage as a result of the breach.” *Med. Providers Fin. Corp.*  
 26 *II v. New Life Centers, L.L.C.*, 818 F.Supp.2d 1271, 1274 (D.Nev.2011). Further, to bring a breach  
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28 <sup>2</sup> *See* Section II.D. for a discussion of the recommendation that Plaintiff’s non-legally barred claims be dismissed with prejudice.

1 of contract action against Defendant, Plaintiff and Defendant must have a contractual relationship.  
2 *Vargas v. Cal. St. Auto. Ass'n Inter-Ins. Bureau*, 788 F.Supp. 462, 464 (D.Nev.1992). Plaintiff's  
3 Breach of Contract claim alleges that Defendant breached the confidentiality provision of a  
4 settlement agreement to which Defendant is not a party. ECF No. 12-5 at 2. Given that a  
5 document filed with this Court, in this action, unequivocally establishes that Defendant is not a  
6 party to the contract Plaintiff claims Defendant breached, Plaintiff's breach of contract claim  
7 fails as a matter of law. This alone is a basis to recommend dismissal of Plaintiff's claim.

8 Plaintiff's breach of contract claim also fails to state a claim because it provides no facts  
9 whatsoever in support of Defendant's alleged breach. ECF No. 91 at 9-10. Plaintiff's  
10 conclusory statement that Defendant breached the contract fails to assert even threadbare  
11 elements of a breach of contract cause of action. *Iqbal*, 556 U.S. at 678 (internal citation omitted).  
12 Plaintiff's allegation does not establish a "claim to relief that is plausible on its face." *Id.* (internal  
13 citation and quote marks omitted). In sum, Plaintiff fails to assert allegations that cross the line from  
14 a conceivable breach of contract claim to a plausible breach of contract claim and, for this reason,  
15 Plaintiff's breach of contract claim also fails as a matter of law. *Hester*, 2020 WL 7427522, at \*1  
16 citing *Iqbal*, 556 U.S. at 680 citing *Twombly*, 550 U.S. at 547.

17 Finally, as Defendant points out, Defendant provided the settlement agreement to the Nevada  
18 court in connection to its "request for protective or other relief." ECF No. 92 at 8. Paragraph 1(b)  
19 of the agreement at issue provides that the parties to the contract "shall have the right to disclose this  
20 Agreement to a court as part of a request to protective order or other relief, complaint or other  
21 pleading." ECF No. 12-5 at 3. Thus, even if Defendant was a party to the contract, the disclosure  
22 of the agreement was attached to a motion (a pleading) filed with the Court seeking dismissal of  
23 Plaintiff's Complaint. Under the terms of the agreement, this filing did not breach the confidentiality  
24 of the agreement and, again, Plaintiff's breach of contract claim fails as a matter of law.

25 For each and all of the reasons stated above, the Court recommends Plaintiff's Breach of  
26 Contract cause of action be dismissed with prejudice.



5. *Plaintiff's Intentional Infliction of Emotional Distress Claim.*

On pages 10 and 11 of Plaintiff's proposed amended complaint she includes an Intentional Infliction of Emotional Distress Claim. To state a claim for intentional infliction of emotional distress Plaintiff must allege: "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress, and (3) actual or proximate causation." *Dillard Dep't Stores, Inc. v. Beckwith*, 989 P.2d 882, 886 (Nev. 1999) (internal quotation omitted). "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 953 P.2d 24, 26 (1998) (internal quotation marks and citation omitted).

Plaintiff states she brings her claim against Defendant "in connection with" CEC and PHWLTV's alleged conduct. Plaintiff alleges CEC and PHWLTV caused her "gross and blatant emotional distress beyond what is normal by falsely accusing Plaintiff of sending threats/harassing messages to third parties, threatening Plaintiff's life, and breaching a contract ... ." ECF No. 91 at 10-11. However, at the risk of redundancy, looking first at the breach of contract to which Plaintiff repeatedly refers, her proposed amended complaint fails because Defendant could not breach the settlement agreement to which it was not a party. And, even if Defendant was a party to the agreement, the agreement provided for disclosure in the circumstance it was disclosed. Thus, Defendant's disclosure of the settlement agreement does not meet the standard of extreme or outrageous conduct beyond the bounds of decency or tolerability.

This leaves Plaintiff with Defendant's alleged reference to Plaintiff as a schizophrenic and Defendant's alleged defamatory statements that Plaintiff made threats to CEC and Defendant employees. The Court takes judicial notice of the protective order Defendant obtained on behalf of a CEC employee to whom Plaintiff had sent emails and social media messages that included a threat to "her physical safety." ECF No. 36 at 6 citing Eighth Judicial District Court Case No. A-18-784032-C, attached as Exhibit B to Defendant's Request for Judicial Notice, ECF No. 12 at 4:7-9.<sup>3</sup> Defendant also provided evidence to the Court that it had a strong and reasonable basis to believe

<sup>3</sup> Regarding judicial notice, see Fed. R. Evid. 201; *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001).



1 Plaintiff sent a letter to two of its employees stating: “It’ll be the end of lives ... embodying the rage  
 2 of all mass murderers ... It will be lights out” and “Congratulations[.] You have just been added to  
 3 the hit list.” *Id.* at 6 citing Exhibit D thereto (emphasis in original removed). These alleged  
 4 statements by Plaintiff belie the notion that Defendant’s communications with the Court regarding  
 5 Plaintiff’s conduct would meet the standard of extreme and outrageous conduct beyond the bounds  
 6 of decency or tolerability.

7 Finally, even if Defendant made the statements that Plaintiff suffers from schizophrenia and  
 8 was sending threatening messages without a firm foundation to do so, “mere insults, indignities,  
 9 threats, annoyances . . . or other trivialities” do not rise to the level of conduct “outside all  
 10 possible bounds of decency.” ECF No. 83 at 20 citing *Candelore v. Clark Cty. Sanitation Dist.*,  
 11 975 F.2d 588, 591 (9th Cir. 1992) (citing Restatement (Second) of Torts § 46 cmt. d (1965)); *cf.*  
 12 *Stricker v. Nev. Sys. of Higher Educ.*, Case No. 3:06-cv-00613-LRH-VP, 2007 WL 2460036, at  
 13 \*4 (D. Nev. Aug. 24, 2007). Thus, Plaintiff fails to allege sufficient facts to support a claim of  
 14 intentional infliction of emotional distress against Defendant, and this claim should be  
 15 dismissed.

16 D. The Court Recommends Dismissal of this Action with Prejudice.

17 Plaintiff filed her original Complaint two years ago in May 2019. She was twice given an  
 18 opportunity to amend her Complaint. ECF Nos. 83 and 89. Plaintiff failed to file an amended  
 19 complaint in response to the first opportunity provided, and filed late when given the second  
 20 opportunity. Compare ECF Nos. 89 and 91. Moreover, now that Plaintiff has filed a Motion for  
 21 Leave to Amend and a proposed amended complaint, the amended complaint fails to state any claims  
 22 upon which relief may be granted. Plaintiff’s civil conspiracy claim is barred by res judicata. Each  
 23 of Plaintiff’s three other claims fail as pleaded for the reasons stated. Allowing Plaintiff yet another  
 24 opportunity to amend her Complaint to replead these same non-legally barred claims would unduly  
 25 delay this action, which has never gone further than the pleading stage. Given all of these  
 26 circumstances, the Court recommends denying Plaintiff’s Motion for Leave to File an Amended  
 27 Complaint and dismissing this action with prejudice. *Yakama Indian Nation v. State of Wash. Dep’t*  
 28 *of Revenue*, 176 F.3d 1241, 1246 (9th Cir.1999) (leave not granted if amendment “would cause

prejudice to the opposing party ... is futile, or creates undue delay.”); *see also Chodos v. West Publ’g Co., Inc.*, 292 F.3d 992, 1003 (9th Cir. 2002) (“[W]hen a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly broad” (citation and internal quotation marks omitted)).

### III. Recommendation

IT IS HEREBY RECOMMENDED that Plaintiff’s Motion for Leave to File Amended Complaint (ECF No. 91) be DENIED.

IT IS FURTHER RECOMMENDED that this action be dismissed with prejudice.

Dated this 25th day of May, 2021.

  
 ELAYNA J. YOUCHAH  
 UNITED STATES MAGISTRATE JUDGE

### NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court’s order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).